

# Cameras in the Restroom: Police Surveillance and the Fourth Amendment

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## I. Introduction

In 1970, Leroy Triggs and David Crockett were discovered engaging in consensual sexual activity in a public restroom in California, and they were later convicted of "oral copulation."<sup>1</sup> The sole witness against them was a police officer who observed their conduct by peering through a vent in the restroom ceiling.<sup>2</sup> The police officer acted without a search warrant and without probable cause.<sup>3</sup> Mr. Triggs challenged the police surveillance as an unconstitutional search under the Fourth Amendment.<sup>4</sup>

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1. *People v. Triggs*, 506 P.2d 232, 233-34 (Cal. 1973).  
2. *Id.* at 234.  
3. *Id.* at 239.  
4. *Id.* at 234.

In a similar case, Timothy Gilbert is currently challenging police surveillance of him while he was in a public restroom.<sup>5</sup> Mr. Gilbert was “experienc[ing] intestinal discomfort,” and he entered a stall in a public restroom.<sup>6</sup> While using the toilet, he was observed by a police officer who was hidden in the ceiling above the restroom.<sup>7</sup> Mr. Gilbert was arrested and detained, even though there was no evidence that he had engaged in illegal activities.<sup>8</sup>

The issue in both cases is whether police surveillance of a public restroom<sup>9</sup> is an unconstitutional search under the Fourth Amendment of the Constitution. The Fourth Amendment protects people from “unreasonable searches and seizures”<sup>10</sup> by federal and state governments.<sup>11</sup> The government must have probable cause<sup>12</sup> before conducting a search, or the search is considered unreasonable and thus unconstitutional.<sup>13</sup> Usually the police are required to obtain a warrant

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5. *Gilbert v. Sears, Roebuck and Co.*, 826 F. Supp. 433 (M.D. Fla. 1993). Mr. Gilbert is suing police and store employees under 42 U.S.C. § 1983, alleging violation of numerous rights, including the Fourth Amendment as incorporated under the Fourteenth Amendment. In the opinion cited, the court rejected defendants’ motion to dismiss.

6. *Id.* at 434.

7. *Id.* at 434-35.

8. *Id.* at 435. Despite repeated requests, the police refused to inform Mr. Gilbert of the crime he was being charged with. *Id.* A newspaper article indicated that Mr. Gilbert was charged with “exposure of sex organs” and this charge was later dismissed for insufficient evidence. Bruce Vielmetti, *Restroom Surveillance Challenged*, ST. PETERSBURG TIMES, Feb. 23, 1993, at 1B. As a result of the arrest and an incorrect police report, Mr. Gilbert was temporarily suspended from his job as an assistant principal, and later returned to work in a “district office instead of in a school as a principal.” *Id.*

9. For the purposes of this Note, a public restroom is a restroom open to the public. In *Triggs*, the restroom was located in Arroyo Seco Park in Los Angeles. 506 P.2d at 234. In *Gilbert*, the restroom was located in a Sears department store in a Tampa mall. 826 F. Supp. at 434.

10. Amendment IV of the U.S. Constitution reads in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

11. In *Barron v. Baltimore*, 32 U.S. 243 (1833), the Court held that the Bill of Rights restricts federal but not state action. Later, after the passage of the Fourteenth Amendment, the Court incorporated provisions from the Bill of Rights into the Due Process Clause of the Fourteenth Amendment and held them applicable to the States. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court incorporated the Fourth Amendment into the Fourteenth Amendment, making it applicable to the States. However, the Court did not incorporate the exclusionary rule. *Id.* at 33. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court specifically incorporated the exclusionary rule.

12. The test for probable cause is whether there is sufficient evidence for a person of reasonable caution to believe that seizable evidence will be found in the place to be searched. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

13. See U.S. CONST. amend. IV.

before conducting a search or seizure,<sup>14</sup> but in some circumstances the police may act on probable cause without a warrant.<sup>15</sup> In other circumstances, the government may conduct investigations which are not considered 'searches' and thus do not implicate the Fourth Amendment.<sup>16</sup> Justice Harlan, in his concurrence in *Katz v. United States*, propounded what is now the modern test for determining whether governmental investigatory practices are considered Fourth Amendment searches: does a person have a reasonable expectation of privacy in the place searched.<sup>17</sup>

Since *Katz*, courts have been confronted with a number of cases involving Fourth Amendment challenges to surreptitious surveillance<sup>18</sup> by police of public restrooms.<sup>19</sup> In many of these cases, men were arrested for masturbating or engaging in consensual sex with other men.<sup>20</sup> In the process of researching this Note, no published cases were located in which women were charged with masturbating or having sex with other women in a public restroom.<sup>21</sup> Records are

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14. *Katz v. United States*, 389 U.S. 347, 356-57 (1967).

15. For an explanation of when police may act on probable cause alone, without a warrant, see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE*, §§ 62-65 (1991).

16. *United States v. Miller*, 425 U.S. 435 (1976) (unreasonable to expect privacy in bank deposit slips and checks); *Smith v. Maryland*, 442 U.S. 735 (1979) (unreasonable to expect privacy in pen registers (list of telephone calls made to and from a telephone)); *United States v. Place*, 462 U.S. 696 (1983) (unreasonable to expect privacy from dog sniff in a public place); *Oliver v. United States*, 466 U.S. 170 (1984) (unreasonable to expect privacy from view in open field); *Hudson v. Palmer*, 468 U.S. 517 (1984) (unreasonable to expect privacy in jail cell); *New York v. Class*, 475 U.S. 106 (1986) (unreasonable to expect privacy in vehicle identification number); *California v. Ciraolo*, 476 U.S. 207 (1986) (unreasonable to expect privacy in curtilage, the area surrounding a person's home, when the area is visible from aircraft traveling in legal airspace); *California v. Greenwood*, 486 U.S. 35 (1988) (unreasonable to expect privacy in garbage placed at curb); *Florida v. Riley*, 488 U.S. 445 (1989) (unreasonable to expect privacy in curtilage when the area is visible from helicopter traveling in legal airspace).

17. 389 U.S. 346, 361 (Harlan, J., concurring). See *infra* Section II for a full discussion of the *Katz* test.

18. In *State v. Owczarzak*, 766 P.2d 399, 400 (Or. Ct. App. 1988), the police used a hidden video camera to peer into a public restroom. In *Triggs*, 506 P.2d at 234, the police peered into a public restroom through a vent in the ceiling. Both cases serve to illustrate the type of surveillance this Note is addressing with the term "surreptitious surveillance."

19. See *infra* notes and text accompanying Sections III and IV; see also Michael R. Flaherty, Annotation, *Search and Seizure: Reasonable Expectation of Privacy in Public Restroom*, 74 A.L.R. 4th 508 (1994).

20. The majority of the other cases arising out of police surveillance of public restrooms are drug related. See generally *United States v. Billings*, 858 F.2d 617 (10th Cir. 1988); *State v. Jupiter*, 501 So. 2d 248 (La. Ct. App. 1986); *Moore v. State*, 355 So. 2d 1219 (Fla. Dist. Ct. App. 1978); *United States v. Smith*, 293 A.2d 856 (D.C. 1972).

21. This is not to say that lesbians have not been prosecuted for having sex in quasi-private areas. For instance, in *People v. Livermore*, 155 N.W.2d 711 (Mich. Ct. App. 1967), two women were charged with gross indecency for engaging in consensual sex in a tent at a

not kept on the actual number of people subjected to surreptitious surveillance. The number of people prosecuted based on surreptitious surveillance of public restrooms is not readily available.<sup>22</sup> Anecdotal evidence from published cases and newspaper articles indicates that a number of men have been prosecuted for sexual conduct in public restrooms based on evidence obtained through surreptitious surveillance.<sup>23</sup> Given the *Katz* test, the question presented in these cases is whether an individual has a reasonable expectation of privacy in a public restroom. In addressing this issue, courts have considered a number of factors and have reached divergent conclusions.

In addition, several commentators have addressed the issue of whether it is reasonable to expect privacy in a public restroom.<sup>24</sup>

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public camping ground. One case was found in which a woman was charged for having sex with a man in a men's restroom. *People v. Hunt*, 259 N.W.2d 147 (Mich. Ct. App. 1977). In *Hunt*, a police officer's entrance into the restroom was challenged on Fourth Amendment grounds. *Id.* at 148. The door to the restroom was not locked; the pair had occupied the men's restroom for thirty minutes and could be heard "moaning." *Id.* Based on these facts, the appeals court held that the defendants did not have a reasonable expectation of privacy. *Id.* at 149.

The analysis for women's restrooms would be similar to that of men's restrooms, with the exception that women's restrooms do not include urinals in the common area. See discussion of the common area, *infra* Sections IIIA and IVA.

22. People prosecuted based on evidence obtained through surreptitious surveillance may choose not to challenge the surveillance for a number of reasons, including anti-gay bigotry and the stigma associated with charges of public sex. For example, in four of the five cases cited in note 23, *infra*, only a fraction of the people arrested were involved in the suits challenging the surveillance. For a discussion of anti-gay bigotry and the stigma associated with sex in public restrooms, see generally Tim Retzlaff, *Policing, Politics, and Paradigms: The University of Michigan Restroom Sex Scandals*, 3 STEAM 48 (1995).

23. *Young v. State*, 849 P.2d 336, 339 (Nev. 1993) (approximately twenty people observed engaged in sexual acts); *People v. Austin*, 460 N.W.2d 607, 608 (Mich. Ct. App. 1990) (twenty-eight people arrested); *State v. Holt*, 630 P.2d 854, 856 (Or. 1981) ("The police had been conducting surreptitious surveillance of the men's restroom for approximately two years prior to defendant's arrest but no application for a search warrant was ever made. The officer in the case had made over 130 arrests at this restroom in less than three months of surveillance."); *People v. Dezek*, 308 N.W.2d 652, 654 (Mich. Ct. App. 1981) (forty people arrested); *Kroehler v. Scott*, 391 F. Supp. 1114, 1116 (E.D. Pa. 1975) (twenty people arrested). The same surveillance efforts in *Gilbert*, *supra* notes 5-8, also resulted in the arrest of "[h]undreds of men . . . , but charges against many were dismissed." Vielmetti, *supra* note 8, at 1B. Similar surveillance also resulted in the resignation of a Republican Congressman in the early eighties. Paul N. Valentine, *Former Rep. Hinson Pleads 'No Contest' To Morals Charge*, WASH. POST, May 29, 1981, at A18.

24. George F. Butterworth, Note, *People v. Triggs: A New Concept of Personal Privacy in Search and Seizure Law*, 25 HASTINGS L.J. 575 (1974) (discussing the effect of the condemnation by the court in *People v. Triggs* of clandestine surveillance upon search and seizure law); Jeanette R. Scharrer, Comment, *Covert Electronic Surveillance of Public Rest Rooms: Privacy in the Common Area?*, 6 COOLEY L. REV. 495 (1989) (discussing the then current analysis of Michigan courts considering the reasonableness of an expectation of privacy in the common area of a public restroom); Kristin V. Richardson, Comment, *Searches, Privacy, and the Notion of Constitutional Protection in a Public Restroom*, 25

However, the analyses have largely focused on whether a person has a reasonable expectation of privacy under the case law of a single state. In addition, an attempt to justify a reasonable expectation of privacy in all areas of a public restroom has not been previously undertaken. This Note will address all of the arguments regarding the reasonableness of an expectation of privacy in a public restroom, and it will support the conclusion that it is reasonable to expect privacy in all areas of a public restroom.

Section I of this Note is the Introduction. Section II will explain the *Katz* test. Section III will set forth the arguments that support the finding of a reasonable expectation of privacy in a public restroom. Section IV will analyze the arguments that courts have used to support a finding that it is unreasonable to expect privacy in a public restroom. Finally, Section V will conclude that it is reasonable to expect privacy in all areas of a public restroom.

## II. The *Katz* Test

The modern test for determining whether police activity is a search within the scope of the Fourth Amendment was established in *Katz v. United States*.<sup>25</sup> In that case, the FBI attached an "electronic listening and recording device" to the outside panel of a public telephone booth and used the device to listen to and record the defendant's conversation.<sup>26</sup> The defendant challenged this eavesdropping and the court was asked to determine whether the FBI's conduct was a search under the Fourth Amendment.<sup>27</sup> The parties to the suit focused on whether the area where the defendant was located, a public phone booth, was a constitutionally protected area.<sup>28</sup> In his opinion for the majority, Justice Stewart rejected this approach:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his [or her] own home or office, is not a subject of Fourth Amendment protection. But what he [or she] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>29</sup>

The Court found it reasonable for a person to expect to be free from

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WILLAMETTE L. REV. 855 (1989) (discussing the reasonableness of an expectation of privacy in a public restroom, focusing primarily on Oregon state court opinions and concluding that *Owczarzak* was poorly decided).

25. 389 U.S. 347 (1967).

26. *Id.* at 348.

27. *Id.* at 348-49.

28. *Id.* at 351.

29. *Id.* at 351-52.

the "uninvited ear" in a public telephone booth.<sup>30</sup> The Court held that the government's electronic surveillance "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth" and was thus a search within the meaning of the Fourth Amendment.<sup>31</sup>

In his concurring opinion, Justice Harlan noted that the protection afforded people under the Fourth Amendment "requires reference to a 'place.'"<sup>32</sup> Justice Harlan established a two-part test for determining whether the Fourth Amendment is implicated. First, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that [ ] expectation [must] be one that society is prepared to recognize as 'reasonable.'"<sup>33</sup>

Applying this test to the facts in *Katz*, Justice Harlan recognized a limited expectation of privacy in a public telephone booth: "The point is not that the booth is 'accessible to the public' at other times . . . but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable."<sup>34</sup> Justice Harlan's test was later adopted by the majority of the Court in *New York v. Class*.<sup>35</sup>

The subjective prong from *Katz* has been heavily criticized.<sup>36</sup>

30. *Id.* at 352 ("One who occupies [a public telephone booth], shuts the door behind him [or her], and pays the toll that permits him [or her] to place a call is surely entitled to assume that the words he [or she] utters into the mouthpiece will not be broadcast to the world.").

31. *Id.* at 353. The Court also rejected the old "property threshold" test, in which the Fourth Amendment search and seizure provision was not implicated unless there was a trespass. *Id.* at 352-53.

32. *Id.* at 361 (Harlan, J., concurring).

33. *Id.*

34. *Id.*

35. 475 U.S. 106 (1986).

36. The argument is that the subjective prong would allow a loop-hole through which the police could avoid the requirements of the Fourth Amendment. As one commentator explained:

[I]f the subjective component is taken seriously, the government can eliminate privacy expectations by the simple act of announcing its intention to conduct Orwellian surveillance. Once people know that the government is reading their mail, listening to their conversations, and generally intruding on their privacy, they will have no subjective expectation of privacy.

DRESSLER, *supra* note 15, at §30[D]. The Court has also noted this problem:

[I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that the police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well.

*Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979). The Court acknowledged that in such circumstances, the subjective test would be counterproductive, and the objective test alone

However, the subjective prong has not been formally rejected by a majority of the Court. An analysis of the subjective prong will vary case by case and is beyond the scope of this Note.<sup>37</sup>

### III. Arguments Supporting a Person's Reasonable Expectation of Privacy in a Public Restroom

Courts have been confronted with a number of cases in which a party challenged police surveillance of a public restroom on Fourth Amendment grounds. In order to evaluate whether the Fourth Amendment applies, a court must determine whether the surveillance was a "search" under the *Katz* expectation of privacy test. Many of the court opinions on this issue turn on the particular facts of the case under consideration. However, the courts have focused on two issues: the location of the activity observed and the design of the particular restroom in question. Courts have divided public restrooms into three distinct areas when analyzing privacy expectations: the common area, toilet stalls without doors, and toilet stalls with doors.<sup>38</sup> In each of these areas, courts have differed regarding the reasonableness of a person's expectation of privacy. Courts generally order these three locations hierarchically, with the broadest expectation of privacy in a closed stall, a lesser expectation of privacy in an open or doorless stall, and the narrowest expectation of privacy in the common area.<sup>39</sup> As a result, many of the arguments which support finding a reasonable expectation of privacy in a less private area also apply with greater force to more private areas. This section will outline the arguments adopted by courts which have found a reasonable expectation of privacy in a public restroom.

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would carry the day. *Id.* at 741 n.5. Justice Harlan himself later disavowed the subjective prong that he enumerated, acknowledging that the objective prong alone was sufficient for determining whether the Fourth Amendment is implicated. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

37. This Note takes the position that the general public expects privacy in public restrooms. See *infra* Section III and accompanying footnotes. This expectation is not diminished when the police conduct surreptitious surveillance because a person has no reason to know that he or she is being watched. In addition, the defendants in some of the cases cited in this Note consciously sought to keep their activity private, demonstrating a subjective expectation of privacy. See *infra* notes 93-95 and accompanying text. Finally, this Note will take the position that surreptitious surveillance of public restrooms, even if announced, is Orwellian and should be protected by the Fourth Amendment through application of the objective prong alone.

38. See Flaherty, *supra* note 19.

39. See *infra* Sections IIIA-IIIC and IVA-IVC.

## A. The Common Area

The common area of a public restroom is the area not enclosed by stalls. This area may include sinks for washing hands and urinals (in men's restrooms). It is reasonable to expect privacy from surreptitious surveillance in the common area of a public restroom even though it is open to all same-sex members of the public.

Initially, and most importantly, public restrooms are designed to accommodate activities which our society considers personal. Public restrooms are only open to persons of the same gender for this very reason. For example, in men's restrooms, urinals are often located in the common area. A man must uncover his penis to use a urinal.<sup>40</sup> In our society, both the exposure of genitals and urination are considered private activities. "The final bastion of privacy is to be found in the area of human procreation and excretion' and '[if] a person is entitled to any shred of privacy, then it is privacy as to these matters.'"<sup>41</sup> It is reasonable to expect privacy from surreptitious viewing or videotaping in an area designed to accommodate such personal activities. Other men may be present in a men's restroom, and a user of a urinal will necessarily have a diminished expectation of privacy when others are present. While it is reasonable that a person accept the risk of infringement upon his or her privacy from another person of whose presence he or she is aware, it does not logically follow that a public restroom user should accept the continual and unknown privacy invasion of surreptitious surveillance.

In addition, the common area of a public restroom may be used to conduct many other private activities. The common area may regularly be used to:

[C]hange clothes, nurse infants, adjust undergarments, apply make-up and, putting it somewhat politely, relieve itches in private parts. Commonly, people also carry on private conversations in public restrooms. Members of our free society hardly expect to be monitored while performing these perfectly appropriate and normal activities. That expectation is undiminished by the knowledge that the facility is accessible to others.<sup>42</sup>

It is the expectation of privacy, albeit a limited one, which people rely upon in conducting these private activities.

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40. Some men choose to use a toilet in a stall to ensure a greater degree of privacy.

41. *State v. Casconi*, 766 P.2d 397, 399 (Or. Ct. App. 1988) (alteration in original) (quoting *Sterling v. Cupp*, 607 P.2d 206, 208 (Or. Ct. App. 1980), *aff'd as modified*, 625 P.2d 123 (Or. 1981)).

42. *People v. Austin*, No. 86-57441, slip op. at 9-10 (Ingham Cir. Ct. July 11, 1989) (quoted in Scharrer, 6 *Cooley L. Rev.* 495, n. 162 (1989)).



This reasoning was affirmed by the court in *State v. Owczarzak*.<sup>43</sup> In *Owczarzak*, the police, conducting surveillance of a public restroom with a hidden camera, observed Mr. Owczarzak masturbating in front of a doorless stall.<sup>44</sup> The state argued that Mr. Owczarzak had no reasonable expectation of privacy because he was masturbating in the common area, in the view of another patron.<sup>45</sup> The court rejected this argument, finding that Mr. Owczarzak had a reasonable expectation of privacy to be free from surreptitious surveillance.<sup>46</sup> The court explained that a person in the common area of a public restroom “anticipates that another person might enter and see what is going on. What a person does not anticipate is that his [or her] activity will be seen by concealed officers or recorded by concealed cameras.”<sup>47</sup>

The reasonableness of an expectation of privacy from surreptitious surveillance in a restroom is illustrated by the response of police officers who were subjected to it themselves. For example, in Dade County, Florida, surreptitious surveillance of a restroom in a police station was conducted in an attempt to catch a thief.<sup>48</sup> A hidden camera was operated “for less than an hour over a ten day period.”<sup>49</sup> “The only thing that was visible [from the camera] was the sink.”<sup>50</sup> Nevertheless, the police officers claimed that this surveillance violated their right to privacy and threatened to sue.<sup>51</sup> According to Hugh Peebles, president of the Dade County Police Benevolent Association, the argument that the restroom is not a place where a person can reasonably expect privacy is “outrageous.”<sup>52</sup> He asked: “If you can’t expect privacy in the men’s room, where can you expect it?”<sup>53</sup>

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43. 766 P.2d 399 (Or. Ct. App. 1988). This case was decided solely on state constitutional grounds. The court did not consider the Fourth Amendment issue because the surveillance was rejected as an illegal search under the Oregon Constitution. *Id.* at 401 n.1.

44. *Id.* at 400.

45. *Id.* at 401.

46. *Id.*; see also *People v. Triggs*, 506 P.2d 232, 236 (Cal. 1973) (finding a reasonable expectation of privacy from surreptitious surveillance in a public restroom and that the expectation “is not diminished or destroyed because the toilet being used lacks a door.”). See *infra* notes 71-72 and accompanying text.

47. *Owczarzak*, 766 P.2d at 401.

48. Edna Buchanan, *Police Put Camera Spy In Men’s Room*, MIAMI HERALD, Dec. 3, 1983, at 1B.

49. *Id.* (quoting Lt. Robert Norris of the police station). The surveillance time was minimal because the police were only conducting surveillance during the time that items were left out as bait for the thief. *Id.* Sgt. Fred Pelny, the officer in charge of monitoring the surveillance screen, estimated the time at “closer to 15 minutes because the planted items were always returned so fast.” *Id.*

50. *Id.* (quoting District Commander Douglas Hughes); see also *infra* note 51.

51. *Id.* Sgt. Pelny responded that the surveillance “in no way invaded anybody’s privacy unless they were urinating in the sink.”

52. *Id.*

53. *Id.*

In a similar situation in Concord, California, a surveillance camera was installed in a police restroom in an attempt to catch vandals who had flooded the restroom by stuffing the urinals with toilet paper.<sup>54</sup> Three years later, police officers discovered that the restroom had been subjected to surreptitious surveillance.<sup>55</sup> Thirty-nine individuals joined in a lawsuit against the city and the police chief, claiming the surveillance violated their right to privacy and seeking one million dollars in damages each.<sup>56</sup>

Further, public restrooms are designed to ensure privacy from the view of the general public. "A restroom is a place that, by its very nature, excludes unlimited observation."<sup>57</sup> Public restrooms are enclosures, either with no windows or with windows which are inaccessible to the public view. As such, a person is generally shielded from the view of all people except those who are actually present in the restroom.<sup>58</sup>

Thus, it is reasonable to expect privacy in a public restroom based on the combination of two factors: (1) the private nature of activities which public restrooms are designed to accommodate, and (2) the design features of public restrooms which limit public observation. If a urinal were located in the middle of a town square, it would be unreasonable to expect privacy from view because nothing would block the general public's view. However, men may choose not to use such a urinal for this very reason. Similarly, in areas with restricted public view, such as a booth in a restaurant or a secluded area of a forest, society may be unwilling to recognize a reasonable expectation of privacy because the other indicia of privacy are absent. It is the combination of these two factors which makes it reasonable to expect privacy from surreptitious surveillance in public restrooms.

## B. Doorless Stalls

It is reasonable to expect privacy in a doorless stall located in a public restroom even though the inside of the stall may be visible from some vantage points in the restroom. Doorless stalls are located within a public restroom, isolated from the public view. Within a pub-

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54. Dean Congbalay, *Turmoil Divides Concord Police Dept.*, S.F. CHRON., Dec. 15, 1989, at B8. The area of the restroom covered by the surveillance camera is not discussed in the article.

55. *Id.*

56. *Id.*

57. *Owczarzak*, 766 P.2d at 401.

58. In *People v. Anonymous*, 415 N.Y.S.2d 921, 923 (Justice's Ct. 1979), the court makes the following finding: "The reasonable expectation of privacy generated by the enclosed nature of the whole bathroom facility was only to exclude the using public male users from the gaze of the non-using public." Nevertheless, the court found it unreasonable to expect privacy from surreptitious surveillance. *Id.* at 922-23.

lic restroom, a person expects privacy from all people except those in the restroom.<sup>59</sup> Stalls are designed to provide a greater degree of privacy than the common area: stalls are generally set off from the common area and contain partitions which limit the view of other people in the restroom. In addition, a stall is designed for single occupancy. One court relied on the expectation of exclusive use as a factor supporting the reasonableness of an expectation of privacy.<sup>60</sup> Finally, the toilet is the central feature of a stall, and its use is considered a very personal activity in our society.<sup>61</sup>

In *State v. Casconi*,<sup>62</sup> the State prosecuted Mr. Casconi for public indecency.<sup>63</sup> The State's evidence was based on the observations of a police officer who used a concealed camera to discover Mr. Casconi masturbating inside a doorless toilet stall.<sup>64</sup> The state argued that, as Mr. Casconi could have been seen by a restroom patron, he had no reasonable expectation of privacy in the doorless toilet stall.<sup>65</sup> The court rejected the government's argument: "[t]hat information may be legally obtained does not mean that every method that can be used to obtain the same information does not invade an individual's privacy interest or constitute a search."<sup>66</sup> The court concluded that Mr. Casconi did have a reasonable expectation of privacy in the doorless stall which was violated by the surreptitious surveillance.<sup>67</sup>

Similarly, in *People v. Triggs*,<sup>68</sup> the police arrested Mr. Triggs for having sex with another man in a public restroom based on evidence obtained through the use of surreptitious surveillance.<sup>69</sup> In *Triggs*, the court held that public restroom patrons have a reasonable expectation of privacy from surreptitious surveillance.<sup>70</sup> The court concluded that this expectation of privacy is not defeated by the fact that the patrons entered a doorless stall.<sup>71</sup> The court warned of the privacy implica-

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59. See *supra* Section IIIA.

60. See discussion of *Commonwealth v. Bloom*, *infra* notes 102-103.

61. See *supra* note 41 and accompanying text.

62. 766 P.2d 397 (Or. Ct. App. 1988). This case was decided solely on state constitutional grounds. The court did not consider the Fourth Amendment issue since the surveillance was rejected as an illegal search under the Oregon Constitution. *Id.* at 399.

63. *Id.* at 397.

64. *Id.* at 398.

65. *Id.*

66. *Id.*

67. *Id.* at 399.

68. 506 P.2d 232 (Cal. 1973).

69. *Id.* at 233-34.

70. *Id.* at 236.

71. *Id.* at 237 ("The clandestine observations of rest rooms does not fall from the purview of the Fourth Amendment merely through the removal of toilet stall doors."). See also *Kroehler v. Scott*, 391 F. Supp. 1114, 1118 n.4 (E.D. Pa. 1975) ("Since we find that the expectation of privacy is generated by the nature of the activity involved, rather than by

tions of a finding that it is unreasonable to expect privacy in a public restroom:

[Holding that clandestine observation of doorless stalls in public restrooms is not a search] would permit the police to make it a routine practice to observe from hidden vantage points the restroom conduct of the public whenever such activities do not occur within fully enclosed toilet stalls and would permit spying on the "innocent and the guilty alike." Most persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them. The expectation of privacy a person has when he [or she] enters a restroom is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door.<sup>72</sup>

The court in *Triggs* also noted that the Fourth Amendment protects individuals regardless of whether they are innocent or guilty of criminal activity.<sup>73</sup> For example, unconstitutional surveillance of public restrooms also infringes upon the rights of the individuals who are not arrested, because they are still subjected to unconstitutional surveillance of their most private activities.<sup>74</sup> Thus, it should be reasonable for a person in a public restroom stall to expect privacy from view by all people except those patrons who are within the viewing range of the stall.

### C. Closed-Door Stalls

It is reasonable for a person in a closed stall of a public restroom to expect privacy from public view. A stall is an enclosed area within a public restroom, and thus the outside of a stall is only visible to people present in a restroom. In addition, a closed stall, which surrounds its user, isolates the user from view by other patrons of the restroom. Stalls are designed to afford the user privacy from view so that the user may comfortably engage in the personal activity of using a toilet.

In *Kroehler v. Scott*,<sup>75</sup> the plaintiffs sought an injunction prohibiting the police from conducting surreptitious surveillance of public restroom stalls.<sup>76</sup> The court found that people in public toilet stalls "harbor[ ] reasonable expectations of privacy which are generally recognized as subjectively and objectively reasonable, and are thus enti-

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the precise physical characteristics of the stall, whether or not the stalls had doors is not a crucially material inquiry.").

72. *Triggs*, 506 P.2d at 236.

73. *Id.* at 237.

74. *Id.* at 238.

75. 391 F. Supp. 1114 (E.D. Pa. 1975).

76. *Id.* at 1115.

tled to Fourth Amendment protections.”<sup>77</sup> The court held that “[t]he warrantless and non-selective search of *all* individuals who happen to be in the area cannot be justified under the circumstances here involved.”<sup>78</sup> As the court explained:

[W]e are compelled to safeguard zealously the fundamental guarantees embodied in the Constitution, particularly as they pertain to innocent and law-abiding citizens properly using public facilities. Therefore, we cannot ignore the fact that these surveillances swept into the gaze of the government not only those involved in criminal activity, but also countless innocent and unknowing persons who reasonably expected and were properly entitled to a modicum of privacy. Such a practice cannot be condoned on the sole ground that the [police] understandably expected to find evidence of criminal activity on the part of certain individuals while simultaneously subjecting all individuals using the facilities to a general “search.”<sup>79</sup>

Similarly, in *State v. Limberhand*,<sup>80</sup> a police officer entered a stall in a public restroom adjacent to the stall occupied by Mr. Limberhand and looked through a hole in the partition between the two stalls at Mr. Limberhand’s “crotch area.”<sup>81</sup> The officer observed Mr. Limberhand masturbating.<sup>82</sup> The officer invited Mr. Limberhand to accompany him to a nearby motel, but Mr. Limberhand rejected the proposition.<sup>83</sup> The officer later arrested Mr. Limberhand for obscene live conduct.<sup>84</sup> However, the court concluded that Mr. Limberhand had a reasonable expectation of privacy while in the closed stall:

The activities associated with the use of a toilet are private, based on widely accepted social norms. We acknowledge that the privacy interest in a public telephone booth is auditory while the privacy interest generated within a bathroom stall is to be free from visual intrusion. Otherwise we find no constitutional distinction between a public telephone booth and a public restroom stall with regard to the privacy expectation generated within.<sup>85</sup>

The court noted that the fact that a hole was cut out of the partition did not defeat Mr. Limberhand’s reasonable expectation of privacy.<sup>86</sup>

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77. *Id.* at 1117.

78. *Id.* at 1119.

79. *Id.*

80. 788 P.2d 857 (Idaho Ct. App. 1990).

81. *Id.* at 859.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 861.

86. *Id.*

#### IV. Analysis of Arguments Against a Person's Reasonable Expectation of Privacy in a Public Restroom

This section will present the arguments which courts have found persuasive when concluding that it is unreasonable to expect privacy in the three areas of a public restroom. This section will also analyze these arguments as they are presented.

##### A. The Common Area

Many courts have held that clandestine police surveillance of the common area is not a search because people do not have a reasonable expectation of privacy in this area.<sup>87</sup> The primary argument supporting this theory is that it is unreasonable to expect privacy in the common area because it is open to all same-gender members of the public,<sup>88</sup> and, even if the area is empty, "strangers may enter at any moment."<sup>89</sup>

Courts which have considered instances in which there was no risk of a stranger's sudden intrusion have nevertheless rejected an expectation of privacy in the common area. For instance, in *Commonwealth v. Bloom*<sup>90</sup> the design of the restroom afforded Mr. Bloom three seconds warning time before anyone entering the restroom would reach the common area.<sup>91</sup> The court rejected the argument that this warning time established a reasonable expectation of privacy, concluding that "[n]o logical reason precluded the police from viewing covertly what they had a right to view openly. The defendant's expectation of advance warning is not of constitutionally protected dimensions."<sup>92</sup>

Similarly, in *State v. Jarrell*,<sup>93</sup> two men were observed through a hole in the ceiling of a public restroom by an officer hidden in the attic, and were convicted of "the crime against nature."<sup>94</sup> In *Jarrell*, one man stood and looked out of the restroom window while another man performed oral sex on him.<sup>95</sup> The court held that the men "did

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87. See *infra* notes 88-116 and accompanying text.

88. See, e.g., *State v. Holt*, 630 P.2d 854, 858 (Or. 1981).

89. *Id.*; *People v. Anonymous*, 415 N.Y.S.2d at 923 (Justice's Ct. 1979) ("At any instant it is plain that a member of the public could have walked into the restroom and, have seen, in plain sight the commission of this sexual act. This fact alone destroys utterly the defendants' contention that the trooper's [surveillance] violated their 'reasonable expectation of privacy.'").

90. 468 N.E.2d 667 (Mass. App. Ct. 1984).

91. *Id.* at 668 (the entrance was separated from the common area by a ten to twelve foot wide partition).

92. *Id.*

93. 211 S.E.2d 837 (N.C. Ct. App. 1975), *cert. denied*, 213 S.E.2d 724 (N.C. 1975).

94. *Id.* at 838.

95. *Id.*

not acquire the right to insulate their activities with Fourth Amendment protection merely by attempting to maintain a lookout for persons who might enter the restroom."<sup>96</sup> The *Jarrell* court also rejected the defendants' claim that they had a reasonable expectation of privacy from clandestine surveillance, concluding that there was "no constitutional right in defendants to demand that such observation be made only by some person of whose presence they were aware."<sup>97</sup>

However, courts have found that simply because a police officer may have been able to obtain information without conducting a Fourth Amendment search does not shield other methods of obtaining that information from the requirements of the Fourth Amendment.<sup>98</sup> In *Katz*, for example, the fact that the police may have been able to use a method not violative of the Fourth Amendment to obtain the same information would not have defeated *Katz's* reasonable expectation of privacy from the method actually used by the police.<sup>99</sup>

The fact that another person *may* enter the common area does not defeat the expectation of privacy absent actual entry. The argument is not that it is reasonable to expect absolute privacy in the common area, but rather, that it is reasonable to expect privacy from surreptitious surveillance in the common area. In *Katz*, the court recognized a limited expectation of privacy: the defendant could not expect privacy from public eyes, but could expect privacy from public ears.<sup>100</sup> A public restroom shields an occupant from public eyes just as the telephone booth in *Katz* shielded an occupant from public ears. Unlike the phone booth in *Katz*, however, the common area of a restroom is designed for use by more than one person at a time. Therefore, it is not reasonable to expect exclusive occupancy or to expect privacy from view by other people present in the common area. However, it is reasonable to expect privacy absent actual entry. Surreptitious surveillance is a form of monitoring the restroom without normal entry, and it is reasonable to expect privacy from this type of government entry into the common area of a public restroom.

A parallel can be drawn to *Katz* by imagining two adjoining telephone booths with the glass broken out between the two booths ("phone booth A" and "phone booth B"). A person using phone booth A should not reasonably expect aural privacy from a person using phone booth B. However, if phone booth B is unoccupied, should users of phone booth A have reasonable expectations of privacy from the public ear? It is reasonable for the user of phone booth

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96. *Id.* at 840.

97. *Id.*

98. *See supra* notes 65-72 and accompanying text.

99. *See infra* note 101 and accompanying text.

100. *See supra* Section II and accompanying footnotes.

A to expect privacy as long as phone booth B is unoccupied. The potential that phone booth B will be occupied should not defeat an expectation of privacy when phone booth B is not actually occupied. Similarly, it is reasonable to expect freedom from public view, and thus surreptitious surveillance, as long as a public restroom remains empty. The privacy a person reasonably expects in a public restroom may be limited by the entrance of other members of the public, but the possibility of such an entrance should not result in a finding of no reasonable expectation of privacy at all.

Joshua Dressler provides a permutation of *Katz* which also illustrates the reasonableness of a limited expectation of privacy:

Suppose that X, a lip reader hired by the government, had stood outside the booth and "listened" to D's conversation? If D had observed X watching his lips, would he have had a reasonable expectation of privacy regarding this mode of interception of his conversation? Perhaps not, at least if D had understood that X was reading his lips. Under such circumstances, D "knowingly exposed" (to use Justice Stewart's language) his words to X; his conversations were "in the open" (to use Justice Harlan's words) insofar as X was concerned. As well, Stewart explicitly distinguished between "intruding eyes" and "uninvited ears." One could reason, therefore, that *Katz* stands for the proposition that a person may have a reasonable expectation of privacy regarding one mode of intrusion, and yet have none if the same information is intercepted in another manner.<sup>101</sup>

In the example, the government may use a lip reader to "hear" the conversation, and this would not be considered a search. However, D still maintains a reasonable expectation of privacy from the public ear. The fact that the government could have obtained the same information without conducting a Fourth Amendment search does not allow the government to claim that other methods of obtaining the information are not a search. The same is true in the public restroom context. It may be unreasonable to expect privacy in a public restroom from an "intruding" eye (actual entry) and reasonable to expect privacy from an "uninvited" eye (surreptitious surveillance). The fact that the government could obtain the information without conducting a search, by actually entering the restroom, does not mean that another method, surreptitious surveillance, is not a search.

Some courts have relied on additional factors in holding that there is no reasonable expectation of privacy in a public restroom. The court in *Bloom* held that a right to exclusive use of an area is a prerequisite to a reasonable expectation of privacy in that area.<sup>102</sup> The court noted that since Mr. Bloom did not have a right to exclusive

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101. DRESSLER, *supra* note 15, at §30[C] n.24.

102. *Commonwealth v. Bloom*, 468 N.E.2d 667, 668 (Mass. App. Ct. 1984).



use of the common area, he did not have a reasonable expectation of privacy in the common area.<sup>103</sup>

The Supreme Court has not recognized an "exclusive use" requirement, and such a limited interpretation of *Katz* is not warranted. The Supreme Court has focused on whether a person has a reasonable expectation of privacy.<sup>104</sup> An expectation of exclusive use may add to a person's claim that he or she has a reasonable expectation of privacy, but should not serve as a threshold requirement. For example, in the adjoining telephone booth example, it is reasonable to expect privacy if the other telephone booth is empty, even though there is no reasonable expectation of exclusive use. In addition, use of the common area of a public restroom regularly involves activities which are substantially more private in nature than the use of a public phone, and this fact presents a stronger argument against the exclusive use requirement in the public restroom context.<sup>105</sup> Otherwise, an exclusive use requirement would routinely allow the police to videotape activity in the common area, including the use of urinals.

In *State v. Holt*,<sup>106</sup> an officer looked into a public restroom through a vent between the restroom and a storage room.<sup>107</sup> Based on his observations,<sup>108</sup> the officer entered the restroom, saw Mr. Holt masturbating,<sup>109</sup> and arrested him for public indecency.<sup>110</sup> The court held that Mr. Holt did not have a reasonable expectation of privacy, and thus the police surveillance was not a search.<sup>111</sup> The court buttressed its holding with the argument that if the court were to rule that Mr. Holt did have a reasonable expectation of privacy in the public restroom, this would "severely restrict police stake-outs, surveillances and undercover investigation."<sup>112</sup>

The Fourth Amendment requires a limitation on what the police may lawfully do when fighting crime. Here, however, the court looked at the result of applying the Fourth Amendment and con-

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103. *Id.*

104. *See supra* Section II.

105. *See supra* Section IIIA.

106. 630 P.2d 854 (Or. 1981).

107. *Id.* at 856.

108. The court explained that "the officer saw the defendant enter the restroom, walk to the urinal area and bend over to look under the toilet stall partitions. Both stalls were occupied and defendant left the restroom. After the two restroom occupants departed, defendant re-entered and sat on one of the toilets." *Id.*

109. *Holt*, 630 P.2d at 856. The officer saw Mr. Holt masturbating from two vantage points: through a hole in the partition between two toilets and from the front of the doorless stall. Mr. Holt challenged this evidence as fruit of the poisonous tree of the initial surreptitious surveillance. *Id.* at 858.

110. *Id.* at 856.

111. *Id.* at 858.

112. *Id.*

cluded that there was no reasonable expectation of privacy because a contrary holding would restrict police surveillance. If courts reached similar conclusions in other Fourth Amendment search cases, the Fourth Amendment would soon be rendered a nullity. That enforcement of the Fourth Amendment may inhibit law enforcement is not a principled constitutional reason for finding that it is unreasonable to expect privacy in a particular area.

In *People v. Anonymous*,<sup>113</sup> the police observed two men engage in consensual sodomy in the common area of a public restroom.<sup>114</sup> The court concluded that the police surveillance was not a search because the men had no reasonable expectation of privacy.<sup>115</sup> The court explained that a person's reasonable expectation of privacy in the common area is limited to excretory and ablutional acts, and never includes sexual activity.<sup>116</sup>

This argument is simply not logical. The court could render the Fourth Amendment meaningless with this argument if it is consistently applied in analogous situations. In essence, the court is saying that a person only has a reasonable expectation of privacy for legal activities, but not for illegal activities. If the Supreme Court had applied the same argument in *Katz*, it would have been forced to find no reasonable expectation of privacy because *Katz's* conversation involved the illegal transmission of betting information through the phone lines. Thus, the *Anonymous* court's reasoning on this point is unprincipled.

In addition, the *Anonymous* court noted that the common area does not have all of the indicia of privacy: doors, locks, or boundaries of distance.<sup>117</sup> These requirements are not dictated by *Katz*. In fact, in *Katz* there is no evidence of locks or boundaries of distance, and yet the Court found it reasonable to expect privacy in the public telephone booth. In addition, the common area of a public restroom is physically separated from view of other public areas. The common area often has a door between it and other public areas.

Finally, the *Anonymous* court expressed concern that the general public or "infants of tender years" might be exposed to public gay sex if the police are not allowed to conduct warrantless surveillance of

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113. 415 N.Y.S.2d 921 (Just Ct., Town of Greenburgh, Westchester Cty. 1979).

114. *Id.* at 922-23.

115. *Id.* at 923.

116. *Id.*

117. *Id.* at 923-24. The *Anonymous* court listed a number of justifications for its finding that the defendants did not reasonably expect privacy in the restroom. The court, however, did not explain whether each point independently supports a finding of no reasonable expectation of privacy or some combination of the arguments is necessary to support such a finding.

public restrooms.<sup>118</sup> Again, the court demonstrated a general distaste for gay sex rather than elucidating a neutral constitutional principle. People, including children, are exposed to criminal activity in private and public areas. The court might be able to decrease this exposure across the board by eliminating the probable cause and warrant requirements altogether, but the Fourth Amendment requires otherwise. In addition, the *Anonymous* court did not address other policy issues, such as the relationship between societal bigotry directed at gays and lesbians and the fact that some gay men engage in anonymous sex, in areas such as at public restrooms, in order to hide their sexual orientation.<sup>119</sup> Also, in a case of heterosexuals having sex in public, one court was not concerned about the fact that the general public, including children, might be exposed to public straight sex.<sup>120</sup> Finally, the *Anonymous* court seems unconcerned that failure to recognize an expectation of privacy in public restrooms means that the general public, including children, may be exposed to police cameras and video tape recorders while they are engaging in the various activities conducted in a public restroom.

Even if the courts do find it reasonable to expect privacy from surreptitious surveillance of the common area of a public restroom, the police may still conduct surveillance pursuant to a search warrant based on probable cause. The police may also *enter* restrooms to look for illegal activity.<sup>121</sup> What the police happen to see in plain view is not a search under the Fourth Amendment.<sup>122</sup> Physical entry into the restroom by strangers, including police officers, necessarily diminishes the occupant's privacy expectation, as would the entrance of a police officer into the adjoining booth in the adjacent telephone booth example. Thus, the issue is not whether a person's "activity could have legitimately been seen by another in the restroom but, rather, whether the surreptitious surveillance was a search that invaded his [or her] privacy."<sup>123</sup> The nature of a limited expectation of privacy includes the possibility of having no expectation of privacy in one circumstance, such as from the gaze of co-occupants in the common area, while maintaining an expectation of privacy in other circumstances,

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118. *Id.* at 924.

119. Mr. Holt told the arresting officer that he went to the public restroom looking for a companion for oral sex because it was the only place he could go to find a partner. *Holt*, 630 P.2d at 856. A gay man who was arrested based on police surveillance of an area in the woods of a public park surrounding an isolated sycamore tree explained that the reason gay men have sex in public is "because of taboos, prejudices and hostility toward open homosexuality." Frank Bruni, *Adrian Indecency Arrests Raise Issue of Sexual Bias*, DET. FREE PRESS, Aug. 10, 1990, at A1.

120. *See infra* notes 154 and 155.

121. *Triggs*, 506 P.2d at 238-39 n.7.

122. *Id.*

123. *State v. Owczarzak*, 766 P.2d 399, 401 (Or. Ct. App. 1988).

such as from surreptitious surveillance of the common area. In addition, if the police had been physically present, the participants may not have engaged in the illegal activity.<sup>124</sup> While it is not reasonable to expect absolute privacy in the common area of a public restroom, it is reasonable to expect privacy from surreptitious surveillance.

## B. Doorless Stalls

More courts are willing to find that it is reasonable to expect privacy in a doorless stall than in the common area.<sup>125</sup> However, many courts have rejected the reasonableness of an expectation of privacy in a doorless stall. In *Buchanan v. State*,<sup>126</sup> the police, located in concealed positions above men's restrooms, observed Mr. Buchanan engage in oral sex with men on two separate occasions, in two separate public restrooms.<sup>127</sup> On one occasion Mr. Buchanan was in a stall with the door closed; on the other occasion he was in a doorless stall which was visible from the common area.<sup>128</sup> Based on the observation of the police, Mr. Buchanan was prosecuted for two counts of oral sodomy, convicted and sentenced to two consecutive five-year prison terms.<sup>129</sup> The appeals court held that Mr. Buchanan was only entitled to the "modicum of privacy [that a stall] design affords."<sup>130</sup> The court concluded that Mr. Buchanan had a reasonable expectation of privacy in the stall with the closed door, but had no reasonable expectation of privacy in the doorless stall.<sup>131</sup>

In *Young v. State*,<sup>132</sup> the police had allegedly been unable to catch men engaging in masturbation and oral sex in a public restroom because the police "could be seen and heard approaching the stalls, thus enabling the individuals to discontinue their activities and elude detection."<sup>133</sup> The police began a program of clandestine surveillance of the restroom, including surveillance of doorless stalls, which were not visible from the common area.<sup>134</sup> The court found that the defend-

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124. For instance, in *Bloom*, the defendants argued that the metal partition afforded them three seconds warning time. 468 N.E.2d at 668. Had the police approached, the defendants would have heard the police and could have stopped having sex before the police caught them. Similarly, in *Young*, the police admitted that they could not catch people engaging in sex when they entered the restrooms. 849 P.2d at 339.

125. See *supra* Section IIIB.

126. 471 S.W.2d 401 (Tex. Crim. App. 1971), *cert. denied*, 405 U.S. 930 (1972).

127. *Id.* at 404.

128. *Id.*

129. *Id.* at 403.

130. *Id.* at 404.

131. *Id.*

132. 849 P.2d 336 (Nev. 1993).

133. *Id.* at 339.

134. *Id.* The police conducted their surveillance pursuant to a warrant, and the defendants challenged the warrant. *Id.* at 339. The court did not address the validity of the war-

ants, who were arrested as a result of this surveillance, did not have a reasonable expectation of privacy because they could not “exclude the public [view] simply by retreating into a doorless stall.”<sup>135</sup> The *Young* court explained that the defendants “could [also] be observed over or under the partition and through holes in the partitions,” and thus they could not claim to have a reasonable expectation of privacy in the doorless stalls.<sup>136</sup>

The fact that a doorless stall may not exclude the view of other restroom patrons does not defeat a person’s reasonable expectation of privacy in such a stall. The *Buchanan* and *Young* courts overlooked the possibility of a limited expectation of privacy. When a person enters a stall, he or she enters an enclosure within an enclosure. As such, a person in a doorless stall may expect privacy from all persons except those persons actually in the restroom, within viewing range of the stall. If the restroom is empty or there is no one within viewing range, then it is reasonable to expect privacy from view. “Most persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them.”<sup>137</sup> People using the stalls may rely on this expectation of privacy when there are no patrons within viewing range, and cover their genitals or refrain from engaging in certain personal acts<sup>138</sup> when there *are* patrons within viewing range.

Moreover, the stalls may be positioned in the restroom so that they do not face the common area.<sup>139</sup> Thus, other patrons will not necessarily enter the viewing range of the stalls. While some people who need to use a stall may visually check to see if a stall is available, others may ask or look from the side to see if a stall is empty or being used. Regardless of the location of the stall, most people generally do not look into open stalls that are being used. Were a patron to stand within viewing range of a stall and look in, the person occupying the stall would know that they were being observed.

The possibility that a patron might see into a doorless stall does not defeat the reasonableness of an expectation of privacy in a doorless stall. Otherwise, this possibility could be used by police depart-

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ment because it concluded that the surveillance was not a search, and thus no warrant was needed. *Id.* at 339, 342.

135. *Id.* at 342.

136. *Id.* A person in a stall with a closed door may also be observed over and under the partition and through the holes in a partition. It appears, therefore, that the court’s reasoning would also apply to a stall with the door closed. Arguments regarding the reasonableness of an expectation of privacy in a closed stall are addressed in Section IIIC *supra* and Section IVC *infra*.

137. *Triggs*, 506 P.2d at 236.

138. Cleaning up after using the toilet is one example.

139. *Casconi*, 766 P.2d at 398 (“The toilet interiors could not be seen from the building entrance or from the urinals.”); *Young*, 849 P.2d at 338 (same); *Owczarzak*, 766 P.2d at 400 (noting that the interior of the doorless stalls is not visible from the restroom entrance).

ments to routinely conduct video surveillance of activity occurring in doorless stalls, including the use of the toilet. It may not be reasonable to expect privacy from view when another patron is within viewing range and it also may not be reasonable to expect that no one will ever enter viewing range. However, it is reasonable to expect privacy in a doorless stall if no one is physically present within viewing range. In the case of surreptitious surveillance, another person never physically enters viewing range, and thus it is reasonable to expect privacy from surreptitious surveillance in a doorless stall of a public restroom.

### C. Closed-Door Stalls

Generally, courts have found that people do have a reasonable expectation of privacy in a closed stall.<sup>140</sup> However, some courts have held that even this seemingly reasonable expectation of privacy is limited.

In *State v. Jupiter*,<sup>141</sup> a police officer looked through the space between the door and the frame of a toilet stall,<sup>142</sup> and then climbed upon a vanity next to the stall and looked over the partition and into the stall.<sup>143</sup> From this vantage point, the officer saw that Mr. Jupiter had cocaine, and arrested Mr. Jupiter based on this evidence.<sup>144</sup> Addressing the Fourth Amendment challenge, the court held that Mr. Jupiter did not have a reasonable expectation of privacy from public observation through the one-inch space or from above the partition.<sup>145</sup>

Privacy expectations should not be dependent on such design 'limitations.' Otherwise, it would be unreasonable to expect privacy in a closed-stall because all stalls contain some openings. In both *Limberhand* and *Kroehler* the stall design was limited, yet the courts found it reasonable to expect privacy in both cases.<sup>146</sup> This is because

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140. See *supra* Section IIIC.

141. 501 So. 2d 248 (La. Ct. App. 1986).

142. *Id.* at 249. The officer testified that the size of the opening was no more than one inch. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 250. In so holding, the court relied on *California v. Ciraolo*, 476 U.S. 207, 213-15 (1986), in which the Supreme Court held that police observation from an airplane in public airspace of a fenced-off area was not a search.

146. The actual stall design in *Limberhand* is not spelled out in the opinion, though it would surprise the author if the stall had extended from floor to ceiling or there were no spaces between the doors. However, that court did find that a four-inch hole cut out of the partition did not diminish Mr. Limberhand's reasonable expectation of privacy. 788 P.2d at 861.

The actual stall design in *Kroehler* was not spelled out in the opinion. However, the court did note that it did not matter whether the stalls had doors or not, as it was the nature of the activity associated with the stalls, and not the design, which guaranteed a reasonable expectation of privacy for users. See also *supra* note 71.

it is reasonable to expect that people will not climb over or under partitions, or look through the small open spaces into a stall. In addition, the general expectation of privacy generated from the location of a stall within a public restroom enhances the overall sense of privacy.

In *People v. Kalchik*,<sup>147</sup> Mr. Kalchik performed fellatio and was then masturbated by another man.<sup>148</sup> Both events occurred under a partition separating two stalls in a public restroom.<sup>149</sup> The police observed Mr. Kalchik's conduct through a video camera placed in the ceiling above the stalls.<sup>150</sup> While the court found that it was reasonable for Mr. Kalchik to expect privacy from surreptitious videotaping from above,<sup>151</sup> the court concluded that it was not reasonable for Mr. Kalchik to expect privacy from view under the partition.<sup>152</sup>

Most stalls do not extend to the ground, and are open at the bottom approximately eight to twenty-four inches.<sup>153</sup> To the extent that this area is within the viewing range of patrons of the restroom, a person in a stall may not have a reasonable expectation of privacy from people within the restroom. However, the stall is within a public restroom. As such, a person in such a stall should be entitled to a reasonable expectation of privacy from all people except restroom patrons. In addition, the location of a stall may add to the reasonableness of an expectation of privacy from view from under the stall. Aside from the outermost stall, most patrons will not be able to see into the stalls from a standing position, and most patrons will probably not bend down and position themselves to see into this area. If a police officer, who was physically present in the restroom as a patron, were to position herself or himself in a position where the area was within viewing range, then this may not be a search. But police use of video cameras to look into the open area under the stalls of a public restroom violates a person's reasonable expectation of privacy because it intrudes into an area protected visual intrusion by two sets of enclosures.

## V. Conclusion

That some men choose to engage in sexual activities in public

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147. 407 N.W.2d 627 (Mich. Ct. App. 1987).

148. *Id.* at 629.

149. *Id.*

150. *Id.* The video camera was installed pursuant to a search warrant which the court held was invalid. *Id.* at 631.

151. *Kalchik*, 407 N.W.2d at 631.

152. *Id.*

153. See, e.g., *People v. Dezek*, 308 N.W.2d 652, 654 (Mich. Ct. App. 1981) (eight to twelve inches); *United States v. Billings*, 858 F.2d 617, 617 (10th Cir. 1988) (twelve inches); *Kalchik*, 407 N.W.2d at 630 (fourteen inches); *Young*, 849 P.2d at 338 (twenty-four inches).

restrooms is not disputed by this Note.<sup>154</sup> What this Note demonstrates is that when these men do have sex in public restrooms, police routinely ignore the Fourth Amendment in their quest to arrest. It is useful to ask whether the police are as vigorous in pursuing straight people for having sex in public. Similarly, would the prosecutors pursue the cases with the same vigor and would the judges apply the law in an equally vigorous fashion?<sup>155</sup>

In the context of the Fourth Amendment, this Note argues that it is reasonable for a person to expect privacy from surreptitious surveillance in all areas of a public restroom. In addition, a person should be able to expect an even greater degree of privacy in the more private areas of a public restroom, such as a stall. This means that gay men having sex in a public restroom are entitled to the same expectation of privacy as all other patrons. The courts which have addressed this

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154. Straight and lesbian couples must occasionally have sex in public as well. Deborah Pellowe, a resident of Adrian, Michigan, commented on the harsh sentences facing men caught engaging in consensual gay sex in the woods in Adrian: "Who of us has not had sexual relations, in college or with a date in high school, out on a golf course or in a field or some place that's been considered public property?" Bruni, *supra* note 119. This Note does not advocate the decriminalization of public sex, whether gay or straight. For a discussion of the merits of decriminalizing public sex, see generally PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* (1994). However, this Note seeks to point out the possible inconsistency in the investigation and prosecution between gay public sex and straight public sex. The Note also seeks to raise the question of whether the courts, when hearing cases regarding straight sex in public, would raise the same policy issues that the courts raise in cases involving gay sex in public. See *supra* Section IVA.

155. These questions were answered in one small town in Michigan. In Adrian, Michigan, men who wanted to have anonymous sex with other men went to a large sycamore tree located in the woods of a public park. Bruni, *supra* note 119. The police conducted clandestine surveillance of the woods surrounding the tree over a period of two months. *Id.* They observed seventeen men engage in consensual sex, and these seventeen men were later arrested and prosecuted. *Id.* Many of these men had kept their sexual orientation hidden, fearing public hostility towards open homosexuality, and many were married to women. *Id.* For these men, anonymous sex may have been viewed as the only acceptable way to have sex and keep their sexual orientation a secret. Following arrest, the local newspaper printed their names, and as a result some lost their jobs and others had their homes vandalized. Nat Hentoff, *Sex in the Park*, WASH. POST, Feb. 19, 1991, at A-17.

All seventeen men were convicted and received sentences ranging from fifteen days to one year in jail. *Id.* Many local citizens questioned the fairness of the prosecutions. Deborah Pellowe, a local resident, was quoted asking "are these people going to jail because of what they got caught doing, or because they have a different life-style?" Bruni, *supra* note 119. Don Dalton, another local resident, said "I would say they shouldn't do it in a park. . . . But I would say they went after them because it was guys going in there with guys. A man and a woman aren't going to get six months in jail." *Id.*

One of the judges who heard the cases responded that he would prosecute gays and straights alike. Hentoff, *supra*. Yet when this same judge was actually confronted with a case of straight sex in a parking lot of a bar, the judge ruled, as a matter of law, that the act did not "offend the common sense of decency in the community." *Id.* In Adrian, the fact that the men having sex in public were gay motivated the police to conduct surveillance, the prosecutor to vigorously pursue the cases, and the judges to impose stiff penalties.



issue are divided. In some instances, the courts have justified their findings on grounds that are clearly impermissible.<sup>156</sup> Courts addressing this issue in the future should resolve this issue with a clear application of the *Katz* test and find that a person always has a reasonable expectation of privacy from surreptitious surveillance in a public restroom.

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156. *See supra* notes 102-120 and accompanying text.